Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(A)-16–01 OF 2016
HAMID SULTAN, PRASAD ABRAHAM AND ASMABI MOHAMAD JJCA
23 NOVEMBER 2016

Legal Profession — Disciplinary proceedings — Disciplinary board — Disciplinary proceedings conducted against respondent for alleged misconduct — Whether formal charge should be preferred against respondent before commencement of disciplinary proceedings — Whether order of striking out from Rolls of Advocate and Solicitor manifestly harsh — Legal Profession Act 1976 ss 100 & 103

One Savariar a/l Magalam ('the complainant') had appointed the respondent, an advocate and solicitor to recover a sum of RM59,000 from one Ariasamy a/l Anthony ('Ariasamy'). Ariasamy had made the payment through the respondent, nevertheless, the last three cheques issued by the respondent to the complainant were dishonoured and two of the cheques were drawn on the respondent's client's account. The complainant then lodged a report to the appellant on the matter and consequently the appellant sought written explanation from the respondent. Upon failure of the respondent to provide any written explanation, the disciplinary board ('the DB') issued a notice under s 100(6) and (9) of the Legal Profession Act 1976 ('the LPA') to the respondent for him to appear before the DB. On the respondent's request, the DB referred the matter to the disciplinary committee ('the DC') for further investigation. At the same time, the complainant had withdrawn the complaint against the respondent. However the DC found that the respondent was guilty of misconduct and on the hearing before the DB, the respondent was ordered to make restitution to the complainant in the amount of RM3,800 within one month; and the DB further ordered that the respondent be struck off the Roll as an advocate and solicitor. Dissatisfied with the decision, the respondent filed an appeal in the court below in which the learned judge found that preferment of charges against the respondent was mandatory and hence, the appeal was allowed. The present action was the appellant's appeal against the learned judge's decision in allowing the respondent appeal against the DB's decision. The principle issue for consideration was whether a formal charge should be preferred against the respondent before the commencement of disciplinary proceedings against him after the DB had decided to refer the complaint to the DC for further investigations.

Held, allowing the appeal, setting aside the High Court's order, varying the

DB's order and substituting the order for striking out from the Rolls of Advocates and Solicitors with a fine of RM11,400 to be paid within one month from the date of the order:

(1) The relevant provisions of the LPA in relation to disciplinary proceedings are clear and express and make no provision for the preferment of formal charges against the respondent. Subsection (4) of s 103(a)(i) of the LPA clearly provides for the DC to deliver to the respondent a copy of any written application or complaint and statutory declaration in support thereof and inviting the respondent to forward a written explanation to the DC before it commences its hearing. This subsection preserves the right of the respondent to be heard. Since the regime of the LPA in relation to disciplinary proceedings was clear in terms, there was no necessity for the court to import doctrines of natural justice into the interpretation of such provisions (see paras 15–17).

(2) On the facts, curial intervention was called for by the court as most of the sum to be collected by the respondent for the complainant had been paid out to the complainant and there was dispute of fact as to why the remaining sum of RM2,000 was being retained. Further, the DB failed to take into account the principles of proportionality in coming into its decision. Whilst the court agreed that the cheques were dishonoured and issued directly from the respondent's client's account, the fact that the complainant withdrew his complaint must also be taken into account. Under the circumstances, the order of striking out from the Rolls was manifestly harsh and any right thinking members of the DB taking into account the conduct of the respondent and exercising understanding and compassion to the respondent in the present case case could not have reasonably arrived at a decision to strike out the respondent from the Rolls (see paras 19 & 21–22).

[Bahasa Malaysia summary

Savariar a/l Magalam ('pengadu') telah melantik responden, seorang peguambela dan peguamcara untuk mendapat balik sejumlah RM59,000 daripada Ariasamy a/l Anthony ('Ariasamy'). Ariasamy telah membuat bayaran melalui responden, walau apa pun, tiga cek terakhir yang dikeluarkan oleh responden kepada pengadu tidak laku dan dua cek tersebut telah disediakan dalam akaun responden itu. Pengadu kemudian telah membuat laporan kepada perayu berhubung perkara itu dan akhirnya perayu memohon penjelasan bertulis daripada responden. Apabila responden gagal untuk mengemukakan apa-apa penjelasan bertulis, lembaga tatatertib ('LT') telah mengeluarkan notis di bawah s 100(6) dan (9) Akta Profesyen Undang-Undang 1976 ('APU') kepada responden untuk dia hadir di hadapan LT tersebut. Berhubung permohonan responden, LT telah merujuk perkara itu kepada jawatankuasa tatatertib ('JT') untuk siasatan lanjut. Pada masa sama, pengadu telah menarik balik aduan terhadap responden. Walau bagaimanapun

JT mendapati bahawa responden bersalah kerana salah laku dan pada perbicaraan di hadapan LT, responden telah memerintahkan restitusi dibuat kepada pengadu untuk jumlah RM3,800 dalam satu bulan; dan LT selanjutnya memerintahkan agar responden dikeluarkan dari Daftarai sebagai peguambela dan peguamcara. Berasa tidak puas hati dengan keputusan, responden telah memfailkan rayuan di mahkamah bawahan di mana hakim yang bijaksana mendapati bahawa pertuduhan yang dibuat terhadap responden adalah mandatori dan justeru, rayuan adalah dibenarkan. Tindakan ini adalah rayuan perayu terhadap keputusan hakim yang bijaksana kerana membenarkan responden rayuan terhadap keputusan LT. Isu utama untuk pertimbangan adalah sama ada pertuduhan rasmi patut dibuat terhadap responden sebelum prosiding tatatertib dimulakan terhadapnya selepas LT memutuskan untuk merujuk aduan itu kepada JT untuk siasatan lanjut.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi, mengubah perintah LT dan menggantikan perintah pembatalan dari Daftarai Peguambela dan Peguamcara dengan denda RM11,400 untuk dibayar dalam tempoh satu bulan dari tarikh perintah:

(1) Peruntukan-peruntukan relevan APU berkaitan prosiding tatatertib adalah jelas dan nyata dan tidak membuat peruntukan untuk membuat pertuduhan rasmi terhadap responden. Subseksyen (4) kepada s 103(a)(i) APU jelas memperuntukkan untuk JT menyampaikan kepada responden sesalinan apa-apa permohonan atau aduan bertulis dan deklarasi statutori bagi meyokongnya dan mempelawa responden mengemukakan penjelasan bertulis kepada JT sebelum ia mula perbicaraan. Subseksyen ini mengekalkan hak responden untuk didengar. Oleh kerana rejim APU berkaitan prosiding tatatertib adalah jelas, tiada keperluan untuk mahkamah mambawa masuk doktrin keadilan asasi dalam penafsiran peruntukan-peruntukan tersebut (lihat perenggan 15–17).

(2) Berdasarkan fakta itu, campur tangan kurial dipanggil oleh mahkamah kerana kebanyakan jumlah wang yang hendak dikutip oleh responden untuk pengadu telah dibayar kepada pengadu dan terdapat pertikaian fakta mengapa jumlah baki RM2,000 dikekalkan. Selanjutnya, LT telah gagal untuk mengambil kira prinsip-prinsip perkadaran untuk tiba kepada keputusannya. Walaupun mahkamah bersetuju bahawa cek itu tidak laku dan dikeluarkan terus dari akaun pelanggan responden ini, hakikat bahawa pengadu telah menarik balik aduannya juga perlu diambil kira. Dalam keadaan ini, perintah pembatalan dari Daftarai adalah nyata kejam dan mana-mana ahli LT yang berfikiran waras yang mengambil kira kelakuan responden dan mengamalkan pemahaman dan belas kasihan kepada responden dalam kes ini tidak boleh semunasabahnya tiba kepada keputusan untuk membatalkan responden dari Daftarai (lihat perenggan 19 & 21–22).]

Notes

For cases on disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1535–1540.

Cases referred to

Aziana bt Uda Bahari v Gan Kong You [2009] 3 MLJ 495, HC (folld)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341, CA (refd)
Rajehgopal v Ganashalingam a/l Rajah dan Majlis Peguam Malaysia Civil Appeal No B-02(W)-452–03 of 2015 (unreported), CA (refd)
Solicitor, Re, A [1956] 1 WLR 1312 (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(c), (3)(i), (3)(n), 100(1)(b), (6), (9), 103(a), (b), 103D(2), (4), (5)

Appeal from: Originating Summons No 17D-2–04 of 2015 (High Court, Ipoh)

Babu Raj Raja Gopal (Kean Chye & Sivalingam) for the appellant.
VS Vishwanathan (VS Viswa & Co) for the respondent.

Prasad Abraham JCA:

INTRODUCTION

[1] This appeal was heard and disposed on 12 August 2016 wherein we had allowed this appeal with no order as costs, and set aside the order of the High Court on 16 November 2015 (see pp 14–16 of *RR*, Part A). We further ordered that the disciplinary board's order to be substituted with a fine of RM11,400 to be paid within one month from the date of the Court of Appeal order. The appellant now seeks to apply for leave from the Federal Court to appeal based on questions of law framed.

BACKGROUND FACTS

[2] The facts are elucidated from the pleadings, judgment of the learned judge and the submissions of respective parties.

[3] The respondent is an Advocate and Solicitor of the High Court of Malaya practising in the Ipoh branch of Messrs Shanti Jeyapalan, Zeti Zulfah & Partners. One Savariar a/l Magalam ('the complainant') appointed the appellant to recover a sum of RM59,000 from one Ariasamy a/l Anthony.

[4] Having received the notice of demand, Ariasamy decided to settle the matter by paying the total amount in monthly instalments. The said instalments were arranged to be paid through the respondent's office to the complainant. However, the last three cheques issued by the respondent to the complainant were dishonoured, of which two were drawn on the appellant's clients account.

[5] The complainant lodged a complaint vide letter dated 19 September 2011 that Ariasamy had paid the respondent RM35,000 but the respondent had only paid him RM28,500. Despite requests, the respondent did not pay him the balance of RM3,800.

[6] The disciplinary board ('DB') sought written explanation from the respondent vide letter dated 1 December 2011 pursuant to s 100(1)(b) of the Legal Profession Act 1976 (Act 166) ('the LPA 1976'). However, the respondent failed to furnish any written statement.

[7] The DB noted that the material facts as stated in the letter of complaint established misconduct on the part of the respondent. The respondent then was given notice under s 100(6) and 100(9) of the LPA 1976 to appear before the DB on 16 March 2012. The respondent then had written on 15 March 2012 requesting for adjournment on medical grounds.

[8] The hearing was fixed on 13 April 2012 and the respondent requested that the matter to be referred to a disciplinary committee ('DC'). The DC hearing was held on 25 October 2013. On 31 October 2013, the DB received an undated letter from the complainant stating that he wished to withdraw his complaint against the respondent as he was the one who had instructed the respondent's clerk to stop payment on the cheques so that he could collect cash from the respondent.

[9] In view of the withdrawal letter, the DB wrote to Bar Council to inquire whether the Bar Council wanted to intervene and thus the DB deferred its deliberations pending decision of the Bar Council.

[10] The DC then found that the respondent was guilty of misconduct for the following reasons:

(a) cheques drawn on solicitors clients' account which were dishonoured countermanded fall under s 94(3)(c) of the LPA 1976;

(b) gross disregard for client's interest under s 94(3)(n) of the LPA 1976; and

(c) allowed an unauthorised person to carry out legal business of his firm

A without control and supervision under s 94(3)(i) of the LPA 1976.

[11] Upon receiving the DC report, the DB sought the view of the Bar Council and the Bar Council decided to intervene on 25 April 2014. DB then issued a notice under s 103D(2), (4) and (5) of the LPA 1976 to the respondent as well as all other parties. On 12 September 2014, the respondent was absent on medical grounds and few adjournments were given due to the respondent's absence. On 12 March 2015, the respondent was again absent and the DB continued with its deliberation and held that:

C (a) the respondent to make restitution to the complaint in the amount of RM3,800 within one month; and

(b) the respondent be struck off the Roll with effect from 21 days of the date of the order.

D FINDINGS

[12] The principal issue raised in this appeal is the question as to whether a formal charge should be preferred against the solicitor concerned before the E commencement of disciplinary proceedings against him after the DB has decided to refer the complaint by the complainant to a DC, for further investigations.

[13] It would appear that the learned judge at first appeared to agree with the F submissions of counsel for the appellant that the law does not require the preferment of charges. However, counsel for the respondent, made reference to a decision of this court ie the unreported decision of *Rajehgopal v Ganashalingam a/l Rajah dan Majlis Peguam Malaysia* Civil Appeal No B-02(W)-452–03 of 2015 which appears to support the proposition that G preferment of charges against the respondent is mandatory. On that ground alone, the learned judge allowed the appeal and set aside the order of the DB. The learned judge then went on to consider other issues raised which were not germane for the purposes of this appeal.

H **[14]** The Federal Court in an appeal from the aforesaid decision of the Court of Appeal reversed the Court of Appeal and the position in law in our view is clear that there is no necessity for preferment of formal charges against the respondent and this issue should be put to rest.

I **[15]** However, we would observe that the relevant provisions of the LPA 1976 in relation to disciplinary proceedings are clear and express and make no provision for the preferment of formal charges against the respondent. In this context, we prefer the views expressed by Justice Kamardin Hashim, in *Aziana bt Uda Bahari v Gan Kong You* [2009] 3 MLJ 495 on this point and we quote:

> [20] With regard to the applicant's contention that she was not given any specific charges before she attended meeting held by the DB, her complaint could not hold water. *There is no requirement either under the Act or under the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 requiring charges to be framed against the applicant. The meeting of the DB cannot be taken as a trial by the court.*

[16] We further wish to point out that upon a careful perusal of ss 103(a) and 103(b) of the LPA 1976, the investigation committee's role is inquisitorial in nature and the rights of the respondent are well provided for. In particular sub-s (4) of 103(a)(i) of the said Act clearly provides the DC before it commences its hearing, deliver to the respondent a copy of any written application or complaint and statutory declaration in support thereof and inviting the respondent to forward a written explanation to the DC. This subsection also preserves the right of the respondent to be heard if he so desires.

[17] Therefore in our view, since the regime of the LPA 1976 in relation to disciplinary proceedings is clear in terms, there is no necessity for the courts to import doctrines of natural justice into the interpretation of such provisions.

[18] For the aforesaid grounds we allowed the appeal and set aside the order of the High Court judge. However, we felt constrained to vary the order of the DB and substitute the order for striking out from the Rolls of Advocates and Solicitors, with a fine of RM11,400 to be paid within one month from the date of the order. We were minded of the words of His Lordship Gopal JCA (as he then was) in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341, a decision of the Court of Appeal and at pp 344–345, wherein His Lordship said and we quote:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
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> > *One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.*
>
> In our judgment, a court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be

such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[19] However on the facts of the present case, we are of the view curial intervention is called for by the court. In this case most of the sum to be collected by the respondent for the complainant had been done so and had been paid out to the complainant. All that remained was a sum of RM2,000 and there appears to be a dispute of fact as to why the said sum of RM2,000 was being retained. In the given circumstances of the case we find that a more appropriate sentence would be a fine rather than striking out the respondent from the Roll.

[20] In determining sentence to be imposed, the functions of the DB should as far as possible be insulated from judicial intervention as the peers of the respondent, senior members of the Bar would be the appropriate forum to meet out the appropriate sentence as provided for under the LPA 1976.

[21] However, we are of the view that the DB failed to take into account the principles of proportionality in coming to the decision that it did. Whilst we agree that the cheques dishonoured were issued directly from the respondent's client's account which by itself is a serious offence and that it is imperative that the operation of the client's account must always be with honesty and integrity. The fact that the complainant withdrew his complaint, must also be taken into account. We would take the approach that looking at the offence, for the purposes of sentencing the respondent, right thinking members of the disciplinary board should consider and deliberate on the mitigatory factors presented before it before it metes out the appropriate punishment. In a situation where punishment ranges from reprimand and/or ensure to striking out from the Rolls, it would be expected of right thinking members of the DB to consider:

(a) the gravity of the offence;

(b) the exculpatory conduct of the respondent; and

(c) the conduct of the complainant since lodging the complaint,

before deciding the appropriate punishment meted out. By way of analogy it is a question of where the pendulum of a clock swings ie to the end of the range of its swing or at a very beginning of the swing. If the degree of the swing of the pendulum swings extremely to the left, then the maximum sentence should be imposed.

[22] Under the given circumstances, we are of the view striking out from the Rolls of the respondent, is manifestly harsh and any right thinking members of the DB taking into account the conduct of the respondent in this case and

exercising understanding and compassion to the respondent in this particular case could not have reasonably arrived at a decision to strike out the respondent from the Rolls. This approach was taken by the English Courts in the case of *Re A Solicitor* [1956] 1 WLR 1312 wherein the court set aside the order for striking out from the Rolls and substituted it with a sentence of suspension and to the judgment of Lord Goddard CJ at p 1315 which we now set out and we agree.

> As I have said, if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme cases, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, the order is one which is too severe considering the nature of the offence which was proved. *It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound to pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions; they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years.*

[23] We therefore ordered accordingly.

Appeal allowed; High Court's order set aside; DB's order varied and order for striking out from Rolls of Advocates and Solicitors substituted with fine of RM11,400 to be paid within one month from date of order.

Reported by Dzulqarnain Ab Fatar